No. 95-1001

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JAMES E. DOYLE, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND ALAN T. TRACY, IN HIS CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Petitioners,

v.

TIME WARNER CABLE, A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

Time Warner contends that the Seventh Circuit decision relates only to a "uniquely Federal" event, the implementation of FCC rate regulation on September 1, 1993 (Res. 8). It states that petitioner "grossly exaggerates" the impact of the Seventh Circuit decision because it was limited to state laws which "would impose

affirmative marketing obligations on cable operators when they engage in certain restructuring . . ." (Res. 1).

This is an attempt to minimize a decision which held, with preemptive force, that any state effort to seek restitution was *de facto* rate regulation (App. 47) and that state consumer efforts conflicted with a federal administrative "rate structure" (App. 47-48) which, under the facts in this case, authorized a practice prohibited by federal law, 47 U.S.C. § 543(f).

Although the factual setting before the Seventh Circuit concerned a time when rate regulation was about to be imposed on cable operators, the Court's legal conclusions went far beyond those narrow confines. It held that the FCC had the authority, whenever its "rate structure" was threatened, to declare a preemptive conflict with state consumer actions. This ruling did not state that Wisconsin was regulating rates (except for its restitution request) but only that its consumer action would "discourage the provision of new services at a reasonable cost [and] . . . would act as a significant incentive to carriers to freeze service offerings." (App. 47).

Such a ruling gives unbridled authority to a federal administrative agency to preempt state action whenever it declares, by rule, that the action would inconvenience those it regulates. As a precedent, it can, and will, be invoked by any federal agency or affected business seeking to stifle troublesome state consumer enforcement actions. It is a green light for the FCC to invoke similar preemptive regulations in the future.[1] As stated in the dissent to the Seventh Circuit decision, App. 54-56:

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[1] The FCC has already paved the way in this respect. Subsec. (c) of its rule (App. 71) prohibits state actions which would "undermine" the rule or any other rule promulgated under sec. 3 of the Cable Act.

> The majority here argues that "the transaction costs involved in complying with a state negative option [will] impact on the rate rules by discouraging the provision of new services at a reasonable cost," . . . This reasoning, taken to its logical end, is also potentially unbounded as it results in all state consumer laws being classified as "rate structures." *Such an interpretation would require all consumer protection laws to be preempted since all such regulation potentially affects cable rates--albeit indirectly.* (emphasis supplied)

The Seventh Circuit ruling that a state restitution action constitutes the regulation of rates is anything but minimal or situation specific. It would provide a direct precedent for preemption in respect to any state enforcement action seeking restitution against an entity that is rate regulated at the federal level, or where rate regulation is prohibited.

The decision below has already[2] resulted in a Florida state court ruling in *Francis Pala, on behalf of herself and all others similarly situated v. Continental Cablevision, Inc*, Broward County Circuit Court, Case No. 94-10854 (09), set forth in the appendix to this brief (R. App. 1-3). The case, a private class action, relates to an offering similar to that of Time Warner's. The Court explicitly relies on the Seventh Circuit decision by stating (R. App. 2, par. 5):

> This Court is persuaded by the reasoning of the Seventh Circuit Court of Appeals in *Time Warner v. Doyle*, 66 F.3d. 867 (7th. Cir. 1994), that because of the relief sought by Plaintiff, whether under statutory *or*

---

[2] The ruling is less than four months old.

> *common law*, would result in a refund or disgorgement of sums by a Continental entity such relief would constitute rate regulation and, accordingly, under the concept of conflict preemption, is preempted by federal law. (emphasis supplied)

The *Pala* court used the precedent in this case to extend the scope of federal preemption to private common law actions as well as those statutorily authorized.

The factual and legal setting in this case demonstrates the unacceptable extent to which the FCC has placed the convenience and economic interests of the regulated cable operators over the long standing and critical enforcement efforts of state officials charged with protecting the economic interests of the consuming public.

Under the vague banner of "restructuring" the FCC has established an administrative precedent which permitted Time Warner and others to bill cable customers - representing in total over 60% of the citizens in this country - for services which had never been ordered.

Contrary to Time Warner's claim that its creation of new cable services was to bring its practices "into compliance with FCC rate regulations prior to the September 1, 1993 effective date of those regulations" (Res. 1), its unbundling in fact resulted in billing customers for services that had never been ordered "by name". This practice was in direct violation of the prohibitions of the federal negative option law, § 543(f). As succinctly stated by the District Court "the FCC is not free to ignore the "by name" requirement (App. 11). Whatever "conflict" existed in this action was not between state and federal enforcement goals but rather between federal law and the FCC regulations.

Not only was the FCC regulation contrary to federal law, it ignored, in the name of cable operator convenience, the long standing doctrine that consideration of a preemption issue such as that before the Court "start[s] with the assumption that the historic police powers of the States [are] not to be superseded . . . by Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992), *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The factual and legal situation presented here contains an unequivocal statement by Congress that "nothing" in the Cable Act is to be construed to prohibit state consumer protection actions unless those actions are specifically preempted "by this subchapter [the Cable Act]," § 552(c)(1).

Time Warner characterizes this provision as one indicating that "Congress did not intend to occupy the field of consumer protection so broadly . . . as to oust all state power." (Res. 6) While this may be the intent of certain "savings" provisions in federal law, indicating the absence of "field" preemption, that is not the case here. 47 U.S.C. § 552(c)(1) was changed in 1992 (see Pet. 10, 21-22) from a "savings" type law to one which *denied* anyone the right to construe the Cable Act in a manner which imposed federal preemption on state consumer enforcement actions, except in the case of specific Congressional preemption.

The analog for this type of legislation is found in *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 358-59, 373-75 (1986). Similar to the language in 47 U.S.C. § 552(c)(1) of the Cable Act, 47 U.S.C. § 152(b), applicable in *Louisiana*, provided that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction" with respect to intrastate communication service. Based on this language, the *Louisiana* Court struck down an FCC order which claimed

to preempt state depreciation procedures for intrastate telephone service on the grounds that the federal policy of "increasing competition" would be thwarted. In responding to argument supporting the FCC order, this Court stated:

> The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for pre-emption. . . . [A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional ***denial*** of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate rate-making purposes. Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do. (emphasis supplied)

Louisiana Public Service Com'n, 476 U.S. at 374-75.

Like 47 U.S.C § 152(b), 47 U.S.C. § 552(c)(1) represents not a "savings" law but an explicit *denial* of the right of the FCC to construe the Cable Act so as to preempt a state consumer action, unless the subject of that action has been "specifically" preempted by law. To argue, as does Time Warner, that the reference to specific preemption by the Cable Act included preemption by the FCC, would be to render the 1992 change in the law as meaningless since no other entity, in this context, is in the position to construe the Cable Act as having preemptive effect.

Respondent's contention (Res. 9-11) that *Total TV v. Palmer Communications*, (No. 94-55112 - 9th Cir.) decided October 24, 1995, App. 57-66, and *Television Ass'n v. Finneran*, 954 F.2d 91, 101 (2d Cir. 1992) are not in conflict with the Seventh Circuit is without basis. Both cases established that federal preemption concerning the "regulation of rates" does not extend to matters which might affect rates (Pet. 22-27). *Total TV* involved practices covered by the California Unfair Practices Act, (Pet. 22) this action involves the Wisconsin Unfair Practices Act (App. 67).

The legal principles established in these cases apply whether the Court is reviewing a specific state action or the conclusions of an administrative agency.

Finally, Time Warner posits in its factual recitation that the practices in question were of no adverse consequence, i.e. "no harm no foul." It states at p. 4 of its brief that "Existing subscribers were unaffected in both the price they paid and the number of channels they received."

Normally, this factor would have nothing to do with the legal issues presented here, however it was referenced by the Seventh Circuit "Only the format of the services for which they were paying had changed" (App. 22) and the *Pala* Florida ruling where the court stated, at par. 3

(R. App. 1-2), that the billing for unordered and optional services constituted "no fundamental change in service or rates in that Plaintiff 'continued to receive the same number of channels and the same equipment.'"

The reference to this factor in both cases implies that the ruling judges felt the preemption was of little consumer significance.

Billing for new and unordered services is anything but insignificant. The FCC rule, App. 71, par. (b), refers only to retiering changes that "do not constitute a fundamental change in the nature of an *existing* service or tier of service." There probably was no fundamental change in the existing "Basic" and "Standard" services, each lost two of twenty plus channels and the price was reduced. The "fundamental change" here, unaddressed by the Court or the FCC, was that four new, unordered and optional services were created, free from rate regulation, and billed to the customer without ever having been ordered "by name."

The Seventh Circuit ruling is critically flawed and deserves review by this Court. For it to remain in place would undermine virtually every state consumer action that impacts in any way upon an entity governed by federal rate preemption.

CONCLUSION

For the reasons above stated, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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January 26, 1996

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 94-10854 (09)

FRANCES PALA, on behalf of herself and all others similarly situated,

Plaintiff,

v.

CONTINENTAL CABLEVISION, INC., a Delaware corporation,

Defendant

ORDER ON MOTION OF ALL DEFENDANTS FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECOND AMENDED COMPLAINT

THIS CAUSE having come on to be heard before the Court, argument of counsel having been heard and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. There is no material issue of fact in this case that Plaintiff, prior to September 1, 1993, was a subscriber to American Cable systems of Florida, Ltd. and subscribed to Lifeline Basic and Satellite Service tiers. Those tiers were comprised of 46 channels of programming.

2. There is no material issue of fact that after the implementation of Federal Communications Commission's ("FCC") rules and orders on September 1,

1993, Plaintiff continued to receive 46 channels of programming although subdivided into three tiers of service.

3. Under the FCC regulations that went into effect on September 1, 1993, this retiering of services constituted no fundamental change in service or rates in that Plaintiff "continued to receive the same number of channels and the same equipment "after September 1, 1993" as she received before that date. Accordingly, there is no fundamental change in service. *In the Matter of Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266 Report and Order and Further Notice of Proposed Rule Making, 8 FCC rcd 5631 ¶440, 441 (1993).

4. Furthermore, Continental was ordered by the FCC to retroactively adjust rates to September 1, 1993 and all state and federal notice requirements were specifically preempted by the FCC. *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket 920266 Order Released July 27, 1993.

5. This Court is persuaded by the reasoning of the Seventh Circuit Court of Appeals in Time Warner Cable v. Doyle, 66 F.3d 867 (7th Cir. 1994), that because the relief sought by Plaintiff, whether under statutory or common law, would result in a refund or disgorgement of sums by a Continental entity such relief would constitute rate regulation and, accordingly, under the concept of conflict preemption, is preempted by federal law. Any statutory or common law claim that would affect the rate regulation or retiering effective September 1, 1993 is preempted by federal law.

6. Furthermore, Continental was ordered to retroactively adjust its rates to September 1, 1993, was

ordered to implement the change notwithstanding any notice requirements under federal or state law, and was specifically permitted to retier its services in the matter implemented on September 1, 1993. Accordingly, under Florida Statute § 501.212(1) the acts complained of by Plaintiff are acts or practices required or specifically permitted by federal law and Florida's Deceptive and Unfair Practices Act is inapplicable.

WHEREFORE, IT IS ADJUDGED:

7. Summary Judgment is hereby granted for all Defendants on all claims brought by Plaintiff.

DONE AND ORDERED in Chamber in Fort Lauderdale, Broward County, Florida this 22nd day of December, 1995.

/s/ KATHLEEN A. KEARNEY
Circuit Court Judge

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